FILED APRIL 10, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **FRANCISCO XAVIER MARQUEZ,** **Member No. 172631,** A Member of the State Bar.	)	Case Nos.: **11-O-16244-PEM; 12-C-17746; 12-C-17748 (Cons.)** **DECISION; ORDER TO SEAL PORTION OF TRIAL RECORD; AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

Introduction[1]

This contested matter involves three consolidated cases: misappropriation of $419,595 in one client matter and two alcohol-related driving convictions.

In the first matter, the California Court of Appeal found that respondent Francisco Xavier Marquez had converted more than $400,000 in funds belonging to the estate of his client's deceased parents and had committed financial elder abuse against his client's brother. As a result, respondent is charged with six counts of misconduct in this disciplinary proceeding: (1) failing to deposit client funds in a trust account; (2) failing to obey a court order; (3) collecting an illegal fee; (4) committing an act of moral turpitude; (5) failing to comply with the law; and (6) failing to perform with competence.

The next two matters are based on respondent's misdemeanor convictions: (1) reckless driving while under the influence of alcohol or drugs in April 2006 (Veh. Code, § 23103.5, subd.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

(a)); and (2) driving with blood alcohol level of .08% or more in July 2011 (Veh. Code, § 23152, subd. (b)).

The court finds, by clear and convincing evidence, that (1) respondent is culpable on four of the charged counts of misconduct; and (2) the facts and circumstances surrounding his second conviction did not involve moral turpitude but constituted other misconduct warranting discipline. Due to the serious nature and extent of respondent's misconduct, as well as the aggravating circumstances, the court recommends that respondent be disbarred from the practice of law and pay restitution of $419,595.

Significant Procedural History

Case No. 11-O-16244

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on September 20, 2012. Respondent filed a response on October 9, 2012.

On March 4, 2013, respondent filed a motion to abate. The State Bar acknowledged that there was an appeal pending before the appellate court, which included some issues that were substantially the same as those involved in this discipline case. Given that a resolution of those issues would expedite this case, the court granted the abatement pending the resolution of the appeal in *Lowe v. Marquez*, California Court of Appeal, First Appellate District, Division One, case number A134286 (*Lowe v. Marquez*).

On June 26, 2013, the appellate court filed an opinion affirming the probate court's second amended judgment. A petition for rehearing was denied on July 24, 2013. On August 5, 2013, respondent filed an appeal with the California Supreme Court (case No. S212553). In September 2013, the Supreme Court issued a remittitur affirming the Court of Appeal's judgment.

On October 4, 2013, the State Bar filed a motion for an order applying collateral estoppel to a judgment entered against respondent in the probate court and the appellate court (*Lowe v. Marquez*). Both the probate court and the appellate court found that the claims for conversion and financial elder abuse against respondent had been established by clear and convincing evidence.

On November 15, 2013, this court granted the State Bar's request that respondent be precluded from litigating the issues of conversion and financial elder abuse in this disciplinary case as the principles of collateral estoppel applied. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195.)

Case No. 12-C-17748

On January 23, 2013, the Review Department of the State Bar Court issued an order referring respondent's misdemeanor conviction of Vehicle Code section 23103.5, subdivision (a), for reckless driving while under the influence of alcohol or drugs, to the Hearing Department for a hearing and decision recommending the discipline to be imposed if the Hearing Department found that the facts and circumstances surrounding respondent's criminal violation involved moral turpitude or other misconduct warranting discipline.

On February 6, 2013, the State Bar Court issued and properly served a Notice of Hearing on Conviction on respondent. Respondent filed a response on February 26, 2013.

Case No. 12-C-17746

On April 22, 2013, the Review Department issued another order referring respondent's misdemeanor conviction of Vehicle Code section 23152, subdivision (b), driving with blood alcohol level of .08% or more, to the Hearing Department for a hearing and decision recommending the discipline to be imposed if the Hearing Department found that the facts and

circumstances surrounding respondent's criminal violation involved moral turpitude or other misconduct warranting discipline.

On April 30, 2013, the State Bar Court issued and properly served a Notice of Hearing on Conviction on respondent. Respondent filed a response on October 16, 2013.

On October 29, 2013, the three cases were consolidated (case Nos. 11-O-16244; 12-C-17748; and 12-C-17746).

Trial

A three-day trial was held on January 7, 8, and 9, 2014. The State Bar was represented by Senior Trial Counsel Robert A. Henderson; respondent was represented by attorney Megan Zavieh. On January 13, 2014, following closing arguments and briefs on culpability and discipline, the court took this matter under submission.

Order to Seal Portion of Trial Record

Attorney Zavieh also filed a motion to seal that part of the testimony dealing with respondent's financial situation as it had an impact on respondent's ongoing litigation. The court hereby grants respondent's request and orders that part of the trial record containing respondent's testimony taken in a closed courtroom on January 9, 2014, be sealed.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 8, 1994, and has been a member of the State Bar of California at all times since that date.

Case No. 11-O-16244 – The Lowe Matter

Background

On January 24, 1995, Henry D. Lowe (Father) and Wai Yung Lowe (Mother) created a revocable living trust, the Lowe Trust. They had three adult children: Edmund Lowe, Jack

Lowe, and Bettina Cloud. The trust provided that Jack was the sole beneficiary. On August 28, 1995, Father died.

On October 23, 1995, Mother executed a new will witnessed by daughter Bettina and Bettina's husband.[2] Bettina did not tell either of her brothers about this will. Under the terms of the will, Mother's estate was to be divided equally among the three children. On November 24, 1995, Mother revoked the Lowe Trust.

On May 16, 2003, Mother signed an amendment to the now revoked Lowe Trust. The amendment was prepared by respondent at the direction of son Jack as he was simply updating Mother's 1995 trust because Jack was undergoing a life-threatening operation. Again, Jack and his wife would be the only beneficiaries. At the time the amendment was prepared, respondent had no direct communication with Mother.

On January 26, 2006, Mother died. Bettina then told Edmund and Jack of the October 23, 1995 will and subsequent revocation of Mother's 1995 trust. Edmund thought Mother's will was effective. He retained the law firm of Coleman & Horowitt, LLP, to represent him.[3]

On the other hand, Jack did not believe the will was effective and sought the legal advice of respondent.[4]

Facts

On February 6, 2006, Jack retained respondent to assist him with the administration of Mother's estate. In the engagement letter, respondent stated that he would represent Jack in any

[2] Mother was taken to a notary public by Bettina's now deceased husband. The will was not a self-proving will.

[3] Edmund testified that the only reason he pursued the matter was that Bettina needed the money that might be available if Mother's will was effective.

[4] Jack did not believe the will was effective because he was never told of the will, though he managed all the financial affairs of his parents. Moreover, his sister did not tell him of the will until after Mother's death. By the terms of the trust and all prior wills of his parents, Jack was the sole beneficiary. This new will divided everything equally amongst the three siblings.

dispute or legal proceeding that Edmund may initiate against him individually or as trustee of Mother's trust. Thereafter, respondent represented Jack against Edmund in a contested matter involving whether Mother's estate would be distributed pursuant to trust documents or pursuant to a subsequently prepared will. The only thing of monetary value in the estate was a home in San Mateo, California.

Four months later, on June 20, 2006, respondent was formally notified by Edmund's lawyer, Eliot S. Nahigian of Coleman & Horowitt, that Mother had signed her last will and testament on October 23, 1995, and that she had revoked the Lowe Trust on November 24, 1995. Copies of the will and revocation of the trust were enclosed. Respondent was also advised that the original will was being delivered to the Clerk of the Superior Court of San Mateo County as required by the probate code. By the terms of this letter, Edmund was clearly asserting that the trust had been revoked and that the will was the operative document.

Sale of Mother's Home

Nevertheless, Jack, believing that the trust was still the operative document, sold Mother's real property in July 2006. On July 17, 2006, the sale proceeds of $721,008.05 from Mother's home was placed in respondent's law firm's business checking account at Stanford Federal Credit Union. On the same day, $681,008.05 of those funds was transferred to respondent's personal savings account and $40,000 was transferred to Katharyn A. Bond, a partner in respondent's law firm. By July 31, 2006, respondent had a balance of $2,318.73 in his business checking account.

Date	*Business Checking Account*	
7/17/06	$721,008.05	Deposited from home sale proceeds
7/17/06	($681,008.05)	Transferred to respondent's savings account
7/18/06	($40,000.00)	Transferred to Katharyn A. Bond
7/31/06	$2,318.73	Balance

Respondent testified that the $40,000 payment to Katharyn A. Bond was for work she did on the case. But there's no evidence to support his testimony. Respondent's April 25, 2006 statement for professional services rendered for Jack from February through April 2006 was in the amount of $2,100. And his September 6, 2006 statement for professional services rendered for Jack from June through August 2006 was for $11,940. However, respondent at trial was unable to account for at least $25,960 ($40,000 - $14,040) that was paid to Bond, as follows:

Date of Billing Statement	*Attorney Fees*
4/25/06	$2,100
9/6/06	$11,940
Total Billed	$14,040
Paid to Katharyn A. Bond	($40,000)
Amount Unaccounted For	*($25,960)*

On September 11, 2006, respondent wired $475,201.69 from his personal savings account into his business checking account with a notation "Jack J Lowe & Sylvia Lowe T." This left a balance of $205,806.36 in his personal savings account ($681,008.05 - $475,201.69) that was from the sale of Mother's home. None of the estate funds was deposited in respondent's client trust account.

On September 11, 2006, respondent paid Jack $13,475.60 for repairs to Mother's home. Respondent's savings account balance on October 31, 2006, was $74,145.73.

Probate Litigation

On March 27, 2007, Edmund filed a petition for probate of will in the Estate of Wai Yung Lowe. Edmund's attorney testified that he filed the petition long after the June 2006 letter because the will was not self-proving and thus it took time to locate the notary public who witnessed the will. On May 24, 2007, respondent under the direction of Jack filed a contest and opposition to probate of will.

On August 22, 2007, Edmund filed a petition to determine the validity of the May 2003 amended trust, along with a complaint against Jack for breach of fiduciary duty, fraud and misrepresentation, conversion, financial elder abuse, and constructive trust.

On April 17, 2009, Edmund filed an amended petition, adding respondent to the causes of action for fraud and misrepresentation, conversion, financial elder abuse, constructive trust, and accounting.[5] The contest of whether the will or the trust governed dragged on with each side accumulating a staggering amount of legal expenses for an estate valued at less than $800,000. To date, Edmund owes his attorneys in excess of $500,000 in fees.

Court Orders

On April 13, 2009, the Probate Court of San Mateo County enjoined Jack and respondent from using funds generated from the sale of Mother's home. It also ordered that respondent deposit all sale proceeds in an interest bearing blocked account at Stanford Federal Credit Union. The court noted:

> "[I]n this case, there is a specific sum of money at issue which is being drawn down by the conduct of JACK LOWE and his counsel and once that is gone, there is no evidence at all to support any kind of argument that there would be sufficient money available to pay damages in this case."

On May 14, 2009, Edmund was appointed special administrator of Mother's estate.

On June 23, 2009, the probate court filed an order re: an accounting and return of estate funds. The court ordered respondent to provide a detailed accounting of all estate funds used to pay respondent's fees as follows:

[5]This amended petition was filed after Edmund's attorney learned that the proceeds from the sale of the house had been put in a non-trust account.

Date	*Withdrawal of Funds as Attorney Fees*
9/11/06	$ 11,940.00
10/31/08	$220,390.76
11/12/08	$150,000.00
1/26/09	$ 37,264.52
Total Withdrawals	*$419,595.28*

The probate court also ordered that $195,801.39 held in respondent's business savings account be transferred to Edmund, as Special Administrator of the Estate, to be deposited in a blocked, interest bearing account, subject to withdrawal only by court order.

On July 13, 2009, respondent filed a response on behalf of himself as well as Jack to the accounting. The home sale proceeds were accounted for as follows: (1) $13,475 as reimbursement to Jack for repair expenses incurred to prepare the home for sale; (2) $194,877 in remaining estate funds; (3) $419,595 in total payments the estate had made to respondent's law firm for costs incurred and legal services rendered from June 22, 2006 through February 2, 2009; and (4) $93,059 in losses the estate suffered as a result of the financial crash in Fall 2008, and paid in early withdrawal penalties and administrative fees.

Although respondent acknowledged receipt of $419,595 in total payments from the estate, his billing records accounted for only $288,059.25 as attorney fees for services rendered from February 13, 2006 through February 2, 2009. Respondent's four billing statements for the three-year period provided the following charged fees and costs:

Date of Billing Statements	*Attorney Fees and Costs*
4/25/06	$ 2,100.00
9/6/06	$ 11,940.00
11/03/08	$220,436.25
5/18/2009	$ 53,583.00
Total Charged Fees and Costs	*$288,059.25*

Based on his billing statements and the amount that he withdrew from the business account as fees, $131,536.03 was unaccounted for ($419,595.2 - $288,059.25). It appears that respondent simply credited the money he took as fees, whether supported or not.

On July 21, 2009, the probate court ordered respondent to file a detailed accounting accompanied by a verification in accordance with Probate Code sections 1061, 1062 and 1063.

On July 29, 2009, respondent and Jack filed a motion for a determination that no conflict of interest existed that warranted respondent's disqualification from continuing to represent Jack. Edmund filed a counter motion to disqualify respondent from representing Jack.

On October 7 and 27, 2009, the probate court filed an order and an amended order, denying respondent's motion and granted Edmund's motion disqualifying respondent from representing Jack. The court also ordered respondent to return and refund the $419,000 in attorney fees and costs paid from the sale proceeds of Mother's home and place the funds in a blocked account pending the final resolution of the case.

Respondent timely received notice of these orders. He then filed a petition for writ of supersedeas, prohibition or other appropriate relief seeking, in part, relief from the order to return and refund approximately $419,000.

The Court of Appeal granted in part respondent's petition for writ of superseadeas and issued an alternative writ of mandate on February 3, 2010, in which it ordered the probate court to set aside the portion of the October orders disqualifying respondent from representing Jack but left in place the order to return and refund approximately $419,000 in attorney fees. On March 12, 2010, the probate court issued an order in which it vacated the October 7, 2009 order except for that portion of the order requiring placement of the attorney fees and costs in a blocked account.

After much litigation, the probate court on May 21, 2010, granted Edmund's motion for summary adjudication, finding that the trust had been revoked and that Jack held the proceeds of the estate as constructive trustee for Mother's estate. In short, the court agreed with Edmund's position that the amended trust was void and invalid because the original Trust had been revoked by Mother in November 1995. Respondent timely received notice of the order.

On March 21, 2011, Edmund and Jack settled their dispute and Jack was dismissed from the litigation. As part of the settlement, the remaining estate funds of $194,877 were distributed to Jack, Edmund, and Bettina.

And on June 20, 2011, the court ordered: "The Petition for Order Directing Transfer of Property to the Estate is GRANTED, consistent with the previous orders of this Court (Hon. Rosemary Pfeiffer on October 7, 2009 as amended on October 27, 2009) and the Alternative Writ issued by the Court of Appeal on February 3, 2010." Respondent timely received notice of the order.

Thereafter, on July 15, 2011, the court ordered respondent jointly and severally with his partners "to pay $419,595.28 to Edmund Lowe as Special Administrator of the Estate of Wai Yung Lowe, within ten (10) days after service of the Notice of Entry of this Order." Respondent timely received notice of the order. The matter proceeded to trial on the remaining issues against respondent.

On November 10, 2011, the court issued an Amended Judgment After Trial. Pursuant to the stipulation of Edmund, Jack, and respondent, Mother's will dated October 23, 1995, was admitted to probate and Edmund was appointed as administrator of the estate. The court found that Edmund had proven by clear and convincing evidence that:

- Respondent was liable to Edmund for financial elder abuse under Welfare and Institutions Code section 15610 because he wrongfully and fraudulently

converted funds belonging to Mother's estate by comingling such funds with his firm's own funds in the business account.

- Respondent, Daniel Meisel and Katharyn A. Bond (law partners) were jointly and severally liable to Mother's estate for the sum of $419,595.28.
- Respondent was liable for conversion based on his comingling of funds belonging to Mother's estate and entrusted to him by Jack as trustee, in his firm's business operating account instead of placing such funds in a client trust account.
- Respondent in bad faith wrongfully took, concealed, and disposed of property belonging to Mother's estate in the sum of $419,595.28, justifying an award of damages under Probate Code section 859, in an amount twice the amount taken or $839,190.56, payable to Edmund as Administrator of Mother's estate.

Court of Appeal

Respondent appealed the court orders of October 7, 2009, October 27, 2009, and March 12, 2010, with respect to the return of the $419,000. Both the probate court and the appellate court found that the claims for conversion and financial elder abuse against respondent had been established by clear and convincing evidence. Specifically, on June 26, 2013, the appellate court confirmed the probate court's findings that (1) respondent had converted funds of Mother's estate to his own use and benefit in the amount of $419,595 by placing the funds in his firm's operating account rather than a client trust account; and (2) respondent had acted in bad faith under former Probate Code section 859, in that he had "wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor, or trust."

A petition for rehearing was filed; it was denied on July 24, 2013. On August 5, 2013, respondent filed an appeal with the California Supreme Court (case No. S212553). In September 2013, the Supreme Court issued a remittitur affirming the appellate court's judgment. To date,

respondent has not complied with the various court orders to return to Mother's estate approximately $419,000 or pay the penalty under Probate Code section 859 for financial abuse of an elder with respect to funds belonging to the estate in the sum of $839,190 (liable for twice the value of the property for bad faith).

At trial respondent admitted that the court orders are final and that although he was disappointed and disagreed with the rulings of the probate court and the appellate court, he respects the rulings. He told this court the only reason he has not complied with the order is that he has not had enough time to gather the funds to pay the order.

Conclusions

Count 1(A) - (§ 6103 [Failure to Obey a Court Order])

Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment.

By clear and convincing evidence, respondent failed to obey several court orders:

(1) On June 20, 2011, the court ordered that property be transferred to the estate, consistent with the previous orders of October 7, 2009 as amended on October 27, 2009.

(2) On July 15, 2011, the court ordered respondent jointly and severally with his partners to pay $419,595.28 to Edmund as special administrator of Mother's estate within 10 days after service of the notice of entry of the order.

(3) On November 10, 2011, the court ordered respondent to pay $419,595.28 in damages for financial elder abuse. The court orders of October 7, 2009, October

27, 2009, and March 12, 2010, with respect to the return of the $419,000 are final as respondent has lost all his appeals of the orders.

Respondent admitted at trial that the court orders are final and that he has not complied with the various court orders to return to Mother's estate approximately $419,000. The only reason respondent has not complied with the court orders is that he does not have $419,000. However, respondent's inability to pay in accordance with the court orders is not a defense to the charged violation of section 6103.

It is well-settled that to be found culpable of willfully violating section 6103, the State Bar need not prove that respondent violated court orders in bad faith. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41.) Willfulness is established by proof that the attorney acted, or omitted to act, purposely. (*In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439.)

Here, by failing to refund and return $419,595 as ordered by the court on October 7, 2009, October 27, 2009, and March 12, 2010, respondent willfully disobeyed or violated an order of the court in willful violation of section 6103.

Count 1(B) - (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

Respondent was required to deposit the sale proceeds of Mother's home in the amount of $721,008.05 into a trust account for the benefit of Mother's estate. Instead, when he received the funds, respondent deposited $721,008.05 into his general business account at Stanford Federal Credit Union on July 17, 2006.

At trial respondent testified that he did not put any of the proceeds from Mother's estate in a client trust account because he never had to deal with the issue of where client money should be placed. Because of his previous work experience as a law clerk, an in-house counsel and an associate, he claimed that he was unfamiliar with the law regarding trust funds. The court finds his contention without merit and disingenuous, particularly for a practitioner of 12 years at the time of his misconduct.

Therefore, by depositing the funds belonging to Mother's estate into his general business account, respondent failed to deposit funds received for the benefit of a client in a client trust account in willful violation of rule 4-100(A).

Count 1(C) - (Rule 4-200(A) [Illegal Fee])

Rule 4-200(A) provides that an attorney must not charge, collect or enter into an agreement for an illegal or unconscionable fee.

Respondent contends that at the time he took the fees he thought the trust was the operative document. Therefore, based on that belief, he argues that acceptance of payment for attorney fees paid out of trust assets without prior court approval for defense of a trust is not acceptance of an illegal fee.

The facts, however, demonstrate that such a belief, even if truly held, was unreasonable and did not change the nature of the estate funds. Even assuming that when he was initially hired in February he thought the amended trust was valid, respondent knew by June that the matter involved probate and at the least, the validity of the trust was at issue. Four months after respondent was hired to represent Jack, Edmund's lawyer notified respondent that the Lowe Trust had been revoked in 1995, forwarding a copy of the revocation of the trust and Mother's will to respondent. Upon receipt of this June 2006 letter, respondent knew or should have known that there was a potential dispute as to the validity of the amended trust. So when he received the

sale proceeds of Mother's home in July 2006, he knew or should have known that the amended trust may be invalid, that the funds may not belong to the alleged trust, and that he had no right to apply the funds towards his fees without court approval.

Under Probate Code section 17209, the administration of trusts is intended to proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the court. But knowing that the trust was being challenged, respondent had a fiduciary duty to protect the funds, whether they were trust funds or estate funds. To obtain payment for his fees, he should have followed proper statutory procedures for obtaining court approval for his fees (Prob. Code, §§ 10810 and 10811). At a minimal, he should have placed the disputed funds in a client trust account and submitted billing statements to Jack, who could then later seek reimbursement from the probate court.

Because the probate court and the appellate court found that the amended trust was invalid, the sale proceeds of $721,008.05 was never a trust corpus and respondent's use of the estate funds was entirely unauthorized. Respondent's belief and reliance that the trust was valid is irrelevant to his culpability of unilaterally paying his fees out of the estate funds absent court approval. The fact remains – there was never a trust corpus for him to dip into. As the appellate court noted: "Because the Trust had been revoked, neither Jack nor [respondent] had any right to use any of these funds."

Therefore, respondent's collection of $419,595.28 from the estate as his attorney fees for the period between July 2006 and February 2009 without first seeking court approval of the fees violated the prohibition against charging or collecting an illegal fee, in willful violation of section 4-200(A). (See *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315 [collecting fee in probate case without obtaining court approval]; In *the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91.)

Count 1(D) - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

By clear and convincing evidence, the appellate court found that (1) respondent had converted funds of Mother's estate to his own use and benefit in the amount of $419,595 by placing the funds in his firm's operating account rather than in a client trust account; and (2) respondent had acted in bad faith under former Probate Code section 859 in that he had "wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor, or trust."

Accordingly, by converting and misappropriating $419,595 in estate funds to his own use and benefit, respondent committed an act involving moral turpitude, dishonesty, or corruption in willful violation of section 6106.

Count 1(E) - (§ 6068, subd. (a) [Attorney's Duty to Support Constitution and Laws of United States and California])

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California.

By taking the $419,595.28 as attorney fees and by failing to return the funds after having been ordered to do so, respondent engaged in financial elder abuse under Welfare and Institutions Code section 15610, and thereby respondent violated California law in willful violation of section 6068, subdivision (a). However, because the same facts underlie both section 6068, subdivision (a), and section 6106 violations, it is not necessary to find him culpable of both violations. Therefore, the court dismisses count 1(E) with prejudice. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

Count 1(F) - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

The State Bar alleges that respondent's failure to file a petition under Probate Code section 17200 to determine whether the trust he was defending existed and that his acceptance of fees without the required court authorization are evidence of his failure to perform legal services with competence in willful violation of rule 3-110(A).

The court disagrees. Since Edmund had already filed a petition to probate the will and a petition to determine the validity of the amended trust, it was unnecessary for respondent to do the same. Respondent's filing oppositions to the petitions was adequate. The real issues in this case are respondent's commingling and conversion of the estate funds, not his competence in representing Jack. Therefore, there is no clear and convincing evidence that respondent willfully violated rule 3-110(A).

Case Nos. 12-C-17746 and 12-C-17748

Respondent has been convicted of two alcohol-related driving offenses in less than six years – the first was in 2006 and the second occurred in 2011.

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crime of which he was convicted. (*In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423.) However, "[w]hether those acts amount to professional misconduct . . . is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction." (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6.)

Case No. 12-C-17748 (2006 Conviction)

Facts

On November 20, 2005, respondent was arrested and charged with driving under the influence of alcohol and/or drugs in violation of Vehicle Code section 23152, subdivision (a), and driving while having 0.08% or more of alcohol in his blood in violation of Vehicle Code section 23152, subdivision (b), both misdemeanors, in San Mateo County.

On April 26, 2006, respondent pled nolo contendere to one count of reckless driving under Vehicle Code section 23103.5, subdivision (a). He was placed on probation for two years, fined $1,063 plus fees, and ordered to complete the first offender program. Respondent complied with the conditions of his probation.

Conclusions

Respondent argues that his conviction did not involve moral turpitude or other misconduct warranting discipline. He claims that his lapse in judgment does not evidence a lack of respect for the legal system or an alcohol abuse problem.

The State Bar does not contend that respondent's first conviction involved moral turpitude or other misconduct warranting discipline.

The court agrees. The facts and circumstances surrounding respondent's misdemeanor violation of Vehicle Code section 23103.5, subdivision (a) (reckless driving), did not involve moral turpitude or constitute other misconduct warranting discipline.

Case No. 12-C-17746 (2011 Conviction)

On February 11, 2011, respondent was arrested and charged with Vehicle Code section 23152, subdivisions (a) and (b), and a separate prior conviction within the meaning of Vehicle Code section 23103. On July 28, 2011, respondent pleaded no contest to a misdemeanor violation of Vehicle Code section 23152, subdivision (b), in Santa Clara County, making it

unlawful for a person who has .08% or more, by weight, of alcohol in his blood to drive a vehicle. He was placed on probation for three years, fined $1,500 plus $800 in costs, and ordered to participate in an alcohol education program and 20 days of community service. He has paid his fines and completed the program.

Conclusions

Respondent again claims that this conviction did not involve moral turpitude or other misconduct warranting discipline. He argues that his first and second convictions were unrelated, separated by six years, and that the incidents did not demonstrate any alcohol problem or disregard for the sanctity of the courts.

The State Bar contends that respondent's level of intoxication in his second conviction was .20%, more than twice the legal limit, and thus, as a second conviction, the offense involved other misconduct warranting discipline.

In *In re Carr* (1988) 46 Cal.3d 1089, the attorney had pled no contest to two separate counts of DUI while he was on suspension for another disciplinary matter involving federal felony drug offense. The Supreme Court found that his conduct did not involve moral turpitude, but did involve other misconduct warranting discipline.

Similarly, in *In re Kelley* (1990) 52 Cal.3d 487, the attorney had twice been convicted of drunk driving over a 31-month period. The second conviction occurred while she was still on probation for the first conviction. The attorney participated in the disciplinary proceeding and presented evidence in mitigation, including the absence of a prior disciplinary record, extensive community service, compliance with all criminal probation conditions since her second conviction and cooperation in the disciplinary proceedings. Nevertheless, the Supreme Court concluded that the facts and circumstances surrounding her second conviction warranted discipline since she demonstrated disrespect for the legal system by violating probation orders

and her two convictions within such a short time indicated an alcohol abuse problem. Both problems, if not checked, could spill over into her professional practice and adversely affect her representation of clients and her practice of law.

Like the attorneys in *Carr* and *Kelley*, respondent has two alcohol-related driving convictions. As the Supreme Court noted, "We cannot and should not sit back and wait until [respondent's] alcohol abuse problem begins to affect [his] practice of law." (*Kelley, supra,* 52 Cal.3d at p. 495.) Despite two convictions, respondent argues that he does not have an alcohol problem.

In view of his two convictions, the court finds that the facts and circumstances surrounding respondent's misdemeanor violation of Vehicle Code section 23152, subdivision (b), did not involve moral turpitude, but constituted other misconduct warranting discipline.

Aggravation[6]

Multiple Acts of Wrongdoing (Std. 1.5(b).)

Respondent's commingling of client funds in his business checking account, misappropriation of $419,595 of estate funds, failure to obey court orders, failure to deposit client funds in a trust account, collection of an illegal fee, and two misdemeanor convictions of driving under the influence involve multiple acts of misconduct and are considered an aggravating factor.

Significant Harm to the Client, the Public, or the Administration of Justice (Std. 1.5(f).)

Respondent's conversion and misappropriation of $419,595 of estate funds and financial elder abuse significantly harmed Jack, Edmund, and Bettina. His failure to obey court orders harmed the administration of justice, wasting valuable judicial time and resources by requiring

[6] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

the courts to repeatedly order him to put the estate funds in a blocked, interest bearing account, pending a final resolution of the probate matter.

Refusal or Inability to Account for Entrusted Funds or Property (Std. 1.5(e).)

Respondent's inability to account for the $25,960 paid to his law partner and the $131,536.03 paid to himself as attorney fees is an aggravating factor.

Failure to Make Restitution (Std. 1.5(i).)

Respondent's failure to make restitution of $419,595 is a serious aggravating factor.

Mitigation

No Prior Record (Std. 1.6(a).)

Respondent had no prior record of discipline for 12 years at the time of his misconduct in the Lowe matter.

Good Character (Std. 1.6(f).)

Respondent presented evidence of good character. Nine witnesses and one expert witness testified on his behalf. The character witnesses, including four attorneys and former and current clients, many of whom have known him for at least 15 years, attested to his integrity, trustworthiness, honesty, tenacity and compassion.

Respondent's character evidence is entitled to mitigation.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review

Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.7(a) provides that, when a member commits two or more acts of misconduct and the standards specify different sanctions for each act, the most severe sanction must be imposed.

However, standard 1.7(b) provides that if aggravating circumstances are found, they should be considered alone and in balance with any mitigating circumstances, and if the net effect demonstrates that a greater sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a greater sanction than what is otherwise specified in a given standard. On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, or the profession and where the record demonstrates that the member is unwilling or unable to conform to ethical responsibilities in the future.

In this case, the standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.1(a), 2.2(a), 2.3(b), 2.7, 2.8(a), and 2.12 apply in this matter.

Standard 2.1(a) provides that disbarment is appropriate for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate.

Standard 2.2(a) provides that actual suspension of three months is appropriate for commingling or failure to promptly pay out entrusted funds.

Standard 2.3(b) provides that suspension or reproval is appropriate for entering into an agreement for, charging, or collecting an illegal fee for legal services.

Standard 2.7 provides that disbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty, fraud, corruption or concealment of a material fact, depending on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member's practice of law.

Standard 2.8(a) provides that disbarment or actual suspension is appropriate for disobedience or violation of a court order related to the attorney's practice of law, the attorney's oath, or the duties required of an attorney under Business and Professions Code section 6068, subdivisions (a) – (h).

Finally, standard 2.12 provides that suspension or reproval is appropriate for final conviction of a misdemeanor not involving moral turpitude but involving other misconduct warranting discipline.

The State Bar argues that respondent be disbarred from the practice of law for misappropriation under standard 2.1(a) and various cases, including *Chang v. State Bar* (1989) 49 Cal.3d 114; *Kennedy v. State Bar* (1989) 48 Cal.3d 610; *In re Ewaniszyk* (1990) 50 Cal.3d 543; and *Harford v. State Bar* (1990) 52 Cal.3d 93.

Respondent contends that if he was found culpable of any misconduct, a nine months' stayed suspension with one year's probation is adequate.

"In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to

exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client's money is not only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221.)

In *Chang v. State Bar, supra*, 49 Cal.3d 114, the attorney was disbarred for misappropriating over $7,000 by secretly opening a trust account in his own name while employed by a law firm, depositing his client's funds in the trust account, later taking the funds, failing to comply with the client's request for copies of bank records, and refusing to pay the client the funds owed. The attorney was also found to have failed to cooperate in the disciplinary investigation by making misrepresentations to a State Bar investigator. The attorney offered no evidence in mitigation, but it was noted that he had no prior record of discipline. In ordering disbarment, however, the Supreme Court noted that it had several reasons to doubt that the attorney would conform his conduct in the future to the professional standards required of attorneys in California. In particular, the Supreme Court noted that the attorney had never acknowledged the impropriety of his actions; he had made no effort at reimbursing the client and displayed a lack of candor to the State Bar.

In *Kennedy v. State Bar, supra*, 48 Cal.3d 610, the attorney was disbarred for his misconduct involving three client matters and misappropriation of over $10,000 from clients without any effort at reimbursement. His mishandling of the matters took place five years after he was admitted to the practice of law.

In *In re Abbott* (1977) 19 Cal.3d 249, the attorney intentionally misappropriated approximately $30,000 from a single client, and as a result, he was convicted of grand theft. In mitigation, he had practiced law blemish-free for 13 years before his misconduct, presented evidence that he suffered from manic-depressive psychosis, submitted character evidence from

several attorneys and judges, and had displayed remorse. The Supreme Court did not find these factors sufficiently compelling to warrant less than disbarment.

"It is well-settled that an attorney may not unilaterally determine his own fee and withhold trust funds to satisfy it even though he may be entitled to reimbursement for his services." (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.)

Here, respondent unilaterally paid his fees with estate funds without court approval, failed to return the funds to the administrator of the estate, despite several court orders to do so, and justified his taking by insisting that he was free to withdraw trust funds without court intervention. His misconduct was not a single act of misappropriation. Rather, he took the money out of the commingled account to pay himself over three years. When the probate court ordered him to provide an accounting, he claimed that he was entitled to withdraw from those entrusted funds to pay his fees of $419,595. Yet, in this proceeding, he could not account for the payment of $25,960 to his law partner in July 2006 nor could the four billing statements totaling $288,059 support his withdrawals of $419,595.

An attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) The appellate court stated: "As Jack's attorney and an officer of the court in the probate matter, and as the custodian of the sale proceeds, [respondent] owed a duty to the Estate, and, as such, to all the beneficiaries of the will, including Edmund." Consequently, respondent had flagrantly breached his fiduciary duties by violating rules 4-100(A) and 4-200(A) and sections 6103 and 6106.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities,

violates basic notions of honesty and endangers public confidence in the legal profession. Therefore, in all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (*Grim v. State* Bar (1991) 53 Cal.3d 21.)

Moreover, under standard 2.1(a), lesser discipline than disbarment is not warranted because the amount misappropriated is not insignificantly small and the most compelling mitigating circumstances do not clearly predominate. After considering the evidence, the standards, other relevant law, and above all, his misappropriation of $419,595, the court concludes that respondent's disbarment is appropriate to protect the public and preserve public confidence in the legal profession. Accordingly, the court so recommends.

Recommendations

It is recommended that respondent Francisco Xavier Marquez, State Bar Number 172631, be disbarred from the practice of law in California and his name be stricken from the roll of attorneys.

Restitution

It is also recommended that respondent Francisco Xavier Marquez be ordered to make restitution to the following payee:

1. **Estate of Wai Yung Lowe** in the amount of $419,595 plus 10 percent interest per year from October 1, 2013.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a)

and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

Respondent Francisco Xavier Marquez is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective 30 calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Order to Seal Portion of Trial Record

Respondent's request that part of the trial record containing respondent's testimony taken in a closed courtroom on January 9, 2014, be sealed is GRANTED. It is so ordered.

Dated: May _____, 2014

PAT McELROY
Judge of the State Bar Court